IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SAVANNAH COLLEGE OF ART AND DESIGN, INC.,	)	
Plaintiff,	)	CIVIL ACTION FILE NO.: 1:14-cv-02288-TWT
v.	)	
SPORTSWEAR, INC., doing business as Prep Sportswear,	)	
Defendant.	)	

DEFENDANT'S (CORRECTED) RESPONSE TO PLAINTIFF'S MOTION TO STAY LITIGATION PENDING APPEAL

COMES NOW Defendant Sportswear, Inc. ("Prep Sportswear"), through its undersigned attorneys, and pursuant to LR 7.1(B), N.D. Ga. respectfully submits this Response to Plaintiff Savannah College of Art and Design, Inc.'s Motion to Stay Litigation Pending Appeal.

Prep Sportswear does not oppose the Motion (for reasons that need not be articulated here). However, Prep Sportswear feels compelled to file this response to provide the Court with a more complete picture prior to ruling. But it bears repeating: Prep Sportswear does not oppose the Motion. Prep Sportswear respectfully points out the following.

Prep Sportswear was granted Summary Judgment on August 3, 2015 on the grounds that Savannah College of Art and Design, Inc. ("the University") did not have any rights in the alleged trademarks in connection with apparel. The University does not have federal registrations for the marks in connection with apparel, nor did it present evidence sufficient to establish it has a common law trademark. The District Court properly granted Prep Sportswear's Motion for Summary Judgment as the University failed to make a prima facie showing it had any enforceable trademark rights in the marks as applied on apparel.

On September 1, 2015 the University filed a Motion to Stay Litigation Pending Appeal with this Court. Prep Sportswear timely files this response.

In view of a request to stay, a court should consider the following four factors set forth by the Supreme Court: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparable injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

Despite its argument to the contrary, the University cannot show a likelihood of success by "simply repeating its earlier argument, which [this] Court previously considered." *In re Roz Trading Ltd.*, 2007 WL 120844, *1 (N.D. Ga. Jan. 11,

2007). The University attempts to argue it should not have been required to show use on apparel, however, as this Court noted in its holding "[c]ommon-law trademark rights are appropriated only through actual prior use in commerce." Doc. No. 53, pg 5 (citing *Crystal Entertainment & Filmworks, Inc. v. Jurado*, 643 F.3d 1313, 1321 (11th Cir. 2011). Further, a federal registration only creates a presumption of rights, but only to the goods or services specified in the registration, not to all goods and services. *Gameologist Grp., LLC v. Scientific Games Int'l, Inc.*, 838 F.Supp.2d 141, 153 (S.D.N.Y. 2011). The University could not establish common law trademark rights before and cannot do it by rehashing the same arguments before the Eleventh Circuit. As such, the University has failed to make a strong showing that it will succeed on the merits.

Under the second factor, a court considering a stay should look to see if the *moving* party will be irreparably harmed absent a stay. *Hilton*, 481 U.S. at 776 (emphasis added). The University argues it will be injured absent a stay due to its need to prepare for the matter before the Eleventh Circuit. As this case was recently appealed, the University has over a month to prepare for the appeal it filed and has timely responded to Prep Sportswear's Motion for Attorneys' Fees. The University has failed to show it will be *irreparable* injured absent a stay. Moreover, the University argued it would be an "unnecessary expenditure of fees

(should this Court issue the requested stay) by having to brief the attorneys' fees issue only one time", but has now done so, undermining its own reasoning. See, Doc. No. 62, pg 7; and Doc. No. 63.

Respectfully submitted this 16th day of September, 2015.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1(C)

I hereby certify that the foregoing has been prepared with one of the font and point selections approved by the Court in Rule 5.1(C) of the Civil Local Rules of Practice for the United States District Court for the Northern District of Georgia, specifically Times New Roman 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system, which will automatically serve and send electronic notification of such filing to all counsel of record.

This 16th day of September, 2015.

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